

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BILLY D. FOWLER

Petitioner,

v.

MAGGIE MILLER-STOUT,

Respondent.

Case No. C06-5620FDB

ORDER ADOPTING
REPORT AND
RECOMMENDATION IN
PART AND GRANTING
PETITIONER'S MOTION
TO DISMISS
UNEXHAUSTED
CLAIMS

The Magistrate Judge's Report and Recommendation explains that Plaintiff has presented four claims in a "mixed petition" that combines two exhausted claims ((1) failure to preserve evidence and (2) insufficient evidence) and two unexhausted claims ((3) defective identification procedure, and (4) ineffective assistance of counsel), and that the petition should be dismissed without prejudice. The Magistrate Judge also explained that Petitioner may file a motion to dismiss the two unexhausted claims and proceed with his two remaining claims.

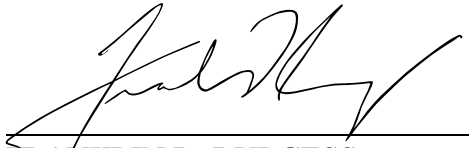
Petitioner responded with a motion to dismiss the third and fourth unexhausted claims in order that his petition would no longer be a mixed petition and so that he could proceed with exhausted claims one and two.

1 The Court having reviewed the Report and Recommendation of the Hon. J. Kelley Arnold
2 United States Magistrate Judge, Petitioner's Motion] filed in response to the Report and
3 Recommendation, and the remaining record, does hereby find and Order:

- 4 (1) The Court adopts the Report and Recommendation as to the conclusion that Fowler
5 presented a mixed petition;
- 6 (2) Petitioner's Motion To Dismiss Third and Fourth Unexhausted Claims [Dkt. # 18 is
7 GRANTED and the Third Claim (Defective Identification Procedure) and the Fourth
8 Claim (Ineffective Assistance) of the petition are **DISMISSED WITHOUT**
9 **PREJUDICE**;
- 10 (3) This matter is again referred to the Magistrate Judge for consideration of the
11 exhausted claims: One (Failure to Preserve Evidence) and Two (Insufficient
12 Evidence).
- 13 (3) The clerk is directed to send copies of this Order to Petitioner, and to the Hon. J.
14 Kelley Arnold.

15 DATED this 23rd day of March 2007.

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FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE